In the Supreme Court of the United States

OCTOBER TERM, 1974

Nos. 69-1 and 74-1460

RICHARD G. AUGENBLICK, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITIONS FOR WRITS OF CERTIORARI TO THE UNITED STATES COURT OF CLAIMS

MEMORANDUM FOR THE UNITED STATES IN OPPOSITION

In No. 74-1460 petitioner contends that the general article of the Uniform Code of Military Justice was improperly used as a lesser included offense to the charge of sodomy, that the Navy court-martial had no jurisdiction to try him because his offense was not service-connected, and that the "entire record" of his court-martial demonstrates "cumulative constitutional deprivations." In No. 69-1 petitioner contends in addition that the Court of Claims should have allowed him to file an amended petition for relief and that the general article is unconstitutional.

1. Petitioner, a former naval commander, was charged in 1961 with the offense of sodomy. A court-martial convicted him of the lesser included offense of committing an indecent act. His conviction was upheld by the Navy Board of Review, and the Court of Military Appeals and the Secretary of the Navy declined to review his case. After he was dismissed from the service, the Board for the Correction of (Naval) Records denied relief.

Petitioner brought suit in the Court of Claims for back pay, contending that certain Jencks Act materials had not been made available to him at his court-martial. The Court of Claims held that failure to produce Jencks Act materials was a defect of constitutional magnitude, which entitled it to review the court-martial and set it aside (377 F.2d 586). On January 14, 1969, this Court reversed the decision of the Court of Claims. *United States* v. *Augenblick*, 393 U.S. 348.

Before action was taken by the Court of Claims on remand, petitioner filed in that court a motion for leave to file a first amended petition, alleging that the Navy had knowingly used false testimony at the court-martial. The Court of Claims denied the motion on April 4, 1969, vacated its previous judgment, and dismissed the original and the amended petitions.

On June 2, 1969, this Court held in *O'Callahan* v. *Parker*, 395 U.S. 258, that only "service connected" offenses may be tried by court-martial. Thereafter, on July 14, 1969, petitioner filed in the Court of Claims a motion for leave to file a second amended petition and for relief from judgment. He requested the Court of Claims to reconsider his case in light of *O'Callahan*, and alleged for the first time that the General Article (Article 134, 10 U.S.C. 934) of the Uniform Code of Military Justice, under which petitioner had been convicted by the court-martial, should not have been applied to his case. In addition, on August 20, 1969, he moved for a stay of the Court of Claims' order of April 4.

On September 2, 1969, before the Court of Claims had acted on the second amended petition, petitioner filed a petition for a writ of certiorari, seeking review of the order of April 4.

On September 4, 1969, petitioner filed a motion in this Court, requesting it to defer action on that petition for a writ of certiorari (No. 69-1) until the Court of Claims ruled on his motion of July 14 raising the *O'Callahan* issue. We did not oppose the motion but sought an extension of time within which to respond. By letter of October 27, 1969, the Clerk granted an extension of time "pending filing of certiorari to review action of the Court of Claims upon [petitioner's] motion of July 14, 1969 in that Court."

On October 31, 1969, the Court of Claims (1) stayed its order of April 4, 1969, until 30 days after it should pass upon petitioner's motion for leave to file a second amended petition, and (2) ordered petitioner's motion for leave to file a second amended petition to be held in abeyance pending this Court's action on various certiorari petitions, then pending, presenting the issue of the retroactivity of *O'Callahan*.

During the next five years the Court of Claims deferred disposition of his motion, pending decision by this Court of related issues raised in the motion. On January 22, 1975, the Court of Claims denied petitioner's motion for leave to file the second amended petition and for relief from judgment (Pet. No. 74-1460 App. B).[1] The court concluded that "*Gosa* v. *Mayden* [413 U.S. 665] is sufficient to dispose of * * * [petitioner's] claim that he is entitled to the coverage of *O'Callahan* v. *Parker*" (Pet. No. 74-1460 App. B, pp. 14a-15a).[2] With respect to petitioner's contention that the general article of

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[1]In the interim, the Court of Military Appeals had rejected petitioner's renewed request for relief. 19 U.S.C.M.A. 638.

[2]A majority of the court held, in addition, "that Augenblick's offense, involving two servicemen in a deviant sexual act, was 'service-connected,' and therefore that *O'Callahan* would be inapplicable even if it were to be applied retroactively" (Pet. No. 74-1460 App. B, p. 15a).

the Uniform Code of Military Justice was unconstitutionally applied to his case, the court concluded that this Court's intervening decisions in *Parker* v. *Levy*, 417 U.S. 733, and *Secretary of the Navy* v. *Avrech*, 418 U.S. 676, were controlling (Pet. No. 74-1460 App. B, pp. 15a-19a), and that petitioner had been on notice that Article 134 was a lesser included offense to the charge of sodomy (*id.* at 17a). The court therefore ordered that its April 4, 1969, order dismissing the original petition would go into effect 30 days later (*id.* at 19a).

2. *No. 74-1460.* The order of the Court of Claims was entered on January 22, 1975. The 90 days within which to petition this Court for review expired on April 22, 1975. The petition No. 74-1460 was not filed until May 20, 1975, and accordingly is jurisdictionally out of time under 28 U.S.C. 2101(c). *Department of Banking* v. *Pink*, 317 U.S. 264. The opinion of the Court of Claims provided that "the order of April 4, 1969, dismissing the petition should go into effect in thirty days" (Pet. No. 74-1460 App. B, p. 19a). This did not, however, extend the time within which to petition for certiorari. As the court below explained in a footnote, "Our order of October 31, 1969, stayed our order of April 4, 1969, until thirty days after action on the motion for leave to file the second amended petition" (*id.* at 91a, n. 13).

This order of "stay" does not affect the date of the entry of judgment, but rather is in the nature of the ordinary delay (pursuant to Fed. R. App. P. 41(a)) in the issuance of mandate on a judgment. The judgment was final when it was entered, although its effectiveness was postponed for 30 days. The time within which to seek certiorari runs from the date upon which the judgment becomes final, and not from the date upon which it becomes effective. See *Boylan* v. *United States*, 257 U.S. 614; *Pink*, *supra*, 317 U.S. at 266; *Pfister* v. *Northern Illinois Finance Corp.*, 317 U.S. 144, 149-150.

In any event, the contentions in No. 74-1460 do not warrant review by this Court.

a. Petitioner's primary contention (Pet. No. 74-1460, pp. 16-36) is that his conviction under Article 134, as a lesser included offense to the charge of sodomy in violation of Article 125, was constitutionally improper. This contention was considered and rejected by the Court of Claims, on whose opinion we rely.

Article 134 forbids, among other things, "all disorders and neglects to the prejudice of good order and discipline in the armed forces" (10 U.S.C. 934). As this Court recently held in *Parker* v. *Levy*, *supra*, the meaning of this language is explained by the Manual for Courts-Martial. The Manual for Courts-Martial in effect at the time of petitioner's court-martial expressly stated that an indecent, lewd or lascivious act with another was such an offense (1951 edition, Appendix 6, p. 492). Moreover, there is no doubt that military law recognized that an Article 134 charge was a lesser included offense to a charge under Article 125. Military law recognized the general principle of lesser included offenses (Article 79, 10 U.S.C. 879; Manual for Courts-Martial, pp. 303-304 (1951 ed.)) and military courts have explicitly held that Article 134 was a lesser included offense to Article 125 (see *United States* v. *Jones*, 13 C.M.R. 420, 422; *United States* v. *Headspeth*, 2 U.S.C.M.A. 635, 10 C.M.R. 133).

The Court of Claims therefore correctly rejected petitioner's argument that he could not be convicted under Article 134. He was charged with conduct that, according to the Manual for Courts-Martial, was an offense under Article 134, and for which that Article was a recognized lesser included offense. As the Court of Claims pointed out (Pet. No. 74-1460 App. B, p. 17a):

> [Petitioner's] claim of lack of due notice evaporates when one considers the facts of [petitioner's] trial. Of the elements of the crime of sodomy the one as to which the proof was weakest was actual penetration. We cannot believe that an officer accused of this type of sodomy would or could think he would go scot-free if actual penetration were not proved beyond a reasonable doubt, but the facts of the occurrence were as found here by the court-martial. Particularly in view of Article 134's specific coverage of indecent and lewd acts, the accused must have known that in those circumstances he could be found guilty of the related, lesser offense of lewd and lascivious conduct.

b. Petitioner next argues that his offense was not service-connected, and that *O'Callahan* v. *Parker*, 395 U.S. 258, should be applied to him retroactively. The Court of Claims properly concluded that *Gosa* v. *Mayden*, 413 U.S. 665, "determines authoritatively that the Constitution does not require that the *O'Callahan* rule be applied to the court-martial convictions occurring prior to June 2, 1969 (the date *O'Callahan* was decided). Though there is no opinion for the Court, the Court's judgment, taken together with the opinions of Mr. Justice Blackmun (for himself and three other Justices) and Mr. Justice Rehnquist, necessarily add up to that result" (Pet. No. 74-1460 App. B, p. 14a; footnotes omitted). Petitioner's invitation (Pet. No. 74-1460, p. 45) to "review the record of this prosecution beyond the strictures of *O'Callahan*" requests the Court to engage in a form of review it has decisively rejected. See *Burns* v. *Wilson*, 346 U.S. 137.

c. Petitioner also requests the Court to review the "record as a whole" for constitutional error. But the error in the "record as a whole" is no greater than the sum of its parts, and none of the parts involves consti-

tutional error. The first "lapse" (Pet. No. 74-1460, p. 37) to which petitioner adverts is the failure of the military authorities to make available to petitioner a tape recording of a statement by one of the witnesses against him. This is the very incident with which the Court dealt when the case was here in 1969, and it unanimously held that a Jencks Act violation does not rise to the level of a denial of constitutional rights.

Petitioner's second and third assignments of error deal with the use of Article 134 as a lesser included offense to Article 125; we have discussed these above, and they involve no constitutional violation. The final contention is that the judges of the Court of Military Appeals engaged in "extracurricular activity" (Pet. No. 74-1460, p. 38) by making known to the Navy and the Department of Justice their desire that the Department seek review, in this Court, of the Court of Claims' first decision. Petitioner cites no authority for the proposition that such activity is either improper or error of constitutional magnitude, and we know of none. It simply demonstrates that two judges of the Court of Military Appeals desired to see their original position vindicated in the Supreme Court; it does not indicate in any way that the judges were personally biased against petitioner, or that they acted out of motives not legally permissible.

3. *No. 69-1.* Petitioner has stated (Pet. No. 74-1460, p. 14, n. 4) that his more recent petition supersedes petition No. 69-1. However, because No. 74-1460 is jurisdictionally out of time, we believe that it cannot effectively supersede No. 69-1. We therefore briefly address the contentions made in No. 69-1.

a. Petitioner contends that the Court of Claims should have entertained his first amended petition and afforded him additional opportunity to demonstrate that prosecu-

torial "improprieties" of constitutional magnitude occurred during his court-martial. Petitioner does not allege in No. 69-1 any specific improprieties in which the prosecution may have engaged; however, he seeks to compel the military authorities to hold a "factual inquiry."

The Constitution does not require military courts to engage in such retrospective inquiries, at least until an individual makes a colorable claim that the inquiry will bear fruit. Petitioner provides no basis for concluding that such an inquiry would disclose any improprieties. Nor does he claim that during his trial "the barriers and safeguards [were] so relaxed or forgotten * * * that the proceeding * * * [was] more a spectacle * * * or trial by ordeal * * * than a disciplined contest" (393 U.S. at 356). The Court of Claims therefore properly denied leave to file the first amended complaint. As the court explained in its opinion of January 22, 1975 (Pet. No. 74-1460 App. B, pp. 12a-13a),

> this [1969] proposed amendment raised issues, which, if open to judicial scrutiny should have been presented earlier, or merely stated or restated positions which had been rejected by the high court or were required by its decision to be refused, we denied (on April 4, 1969), 187 Ct. Cl. 727, the motion for leave to file the first amended petition, and ordered that our previous judgment be vacated and withdrawn and that the petition be dismissed.

The claim petitioner raised in his first amended complaint—that a factual inquiry was necessary—was never tendered to the military courts and not previously raised in the Court of Claims. His belated attempt to inject the issue into the proceedings, after remand from this Court, was manifestly prompted (see Pet. No. 69-1, pp. 5-6) by this Court's statement that knowing use of perjured accomplice testimony would present "a problem of different dimensions" (*United States* v. *Augenblick*, *supra*, 393 U.S. at 353). As the Court immediately observed, however, "nothing of the kind is involved here."

b. The final contention of the petition (Pet. No. 69-1, pp. 9-11, 14-16) is that Article 134 of the Uniform Code of Military Justice is unconstitutional and therefore could not be applied to his court-martial. This Court rejected that contention in *Parker* v. *Levy*, 417 U.S. 733, and *Secretary of the Navy* v. *Avrech*, 418 U.S. 676. Those cases are controlling here.[3]

For the foregoing reasons, it is respectfully submitted that the petitions for writs of certiorari should be denied.

ROBERT H. BORK,
Solicitor General.

MAY 1975.

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[3]Petitioner also contended in No. 69-1 (pp. 7-9, 13-14) that *O'Callahan* should be applied retroactively to his court-martial. This contention is without substance, for the reasons we have discussed at page 6, *supra*.

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